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No. 07-160

IN THE

Supreme Court of the United States

JAMES LALIBERTE, *et al.*, for themselves individually, and as representatives of all similarly situated persons,

Petitioners,

v.

PACIFIC MERCANTILE BANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Court should grant review of the opinion of the California Court of Appeal, Fourth Appellate District, which affirms the trial court's decision that rescission class actions are not maintainable under the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, where the court of appeal's opinion does not conflict with any decision of a state court of last resort or of a United States court of appeals, and the opinion does not implicate an important federal question that needs to be settled by this Court.

II. Whether the Court should grant review of the opinion of the California Court of Appeal, which is consistent with opinions of the First Circuit Court of Appeals and the Fifth Circuit Court of Appeals, both of which have found that under the Truth In Lending Act, 15 U.S.C. § 1601, *et seq.*, rescission is a personal remedy and not subject to class action treatment.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Pacific Mercantile Bank has the following parent corporation: Pacific Mercantile Bancorp.

Pacific Mercantile Bancorp is the only publicly held company that owns 10% or more of Pacific Mercantile Bank's stock.

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STATEMENT OF CASE

The plaintiffs, James Laliberte and Dennis and Jann O'Connor (together, Laliberte and the O'Connors, or Petitioners), all applied for closed-end refinance loans with Pacific Mercantile Bank (PMB) in April 2002, secured by their principal residences. Joint Appendix filed with the California Court of Appeal (J.App.) 290-291. In connection with the loans, PMB provided Laliberte and the O'Connors with disclosure statements as required by the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* (TILA). *See* J.App. 290-291. Both Laliberte and the O'Connors claim their TILA disclosure statements are incorrect because they do not include a $450 closing fee as part of the "Finance Charge." *See* J.App. 292. Accordingly, both Laliberte and the O'Connors informed PMB in writing that they were invoking their right to rescind their loans. J.App. 295, ¶ 39; 296, ¶ 45. PMB refused their requests. *Id.*

Laliberte and the O'Connors filed their Complaint alleging individual causes of action against PMB on May 22, 2003. J.App. 1. They filed a first amended complaint thereafter, adding class action allegations and seeking both statutory damages and rescission for the alleged class. J.App. 15, 28-30. The trial court sustained PMB's demurrer to the first amended complaint with leave to amend, ruling the motion to strike was therefore moot. J.App. 127-131.

Laliberte and the O'Connors filed a second amended complaint, and PMB again demurred and filed a motion to strike. *See* J.App. 132, 154, 179. The trial court again sustained PMB's demurrer and granted PMB's motion to strike, with leave to amend in part but without leave to amend "to seek either rescission or a declaration of entitlement to rescission on the class claims." J.App. 278, 281. Persuaded

by the federal district court's rationale in *Gibbons v. Interbank Funding Group*, 208 F.R.D. 278, 285-286 (N.D.Cal. 2002), the trial court concluded that "neither form of relief is appropriate in a class action." J.App. 281.

Laliberte and the O'Connors filed a third amended complaint on May 5, 2005. J.App. 283. This time the trial court sustained PMB's demurrer to the class claims in the third amended complaint without leave to amend, and Laliberte and the O'Connors appealed from the court's order. J.App. 385-386, 388. The California Court of Appeal, Fourth District, Division 3, affirmed the trial court's ruling denying the plaintiffs leave to amend to seek either rescission or a declaration of entitlement to rescission on the class claims. *Laliberte v. Pacific Mercantile Bank*, 147 Cal. App. 4th 1 (2007) (*Laliberte*). The California Supreme Court denied review.

SUMMARY OF ARGUMENT

No compelling reason exists for the Court to grant review of the Petition filed by Laliberte and the O'Connors. The Petition is taken from a California intermediate appellate court decision, the California Supreme Court denied review, two United States courts of appeals have entered decisions that are consistent with the California Court of Appeal's decision, and no United States court of appeals has decided a case to the contrary.

Further, nothing is to be gained from the Petition. The United States courts of appeals, and the California court of appeal in this case, have all correctly interpreted the TILA to preclude class-wide rescission relief. The statute on its face, as well as in its legislative history, supports a conclusion

Congress never intended for class-wide rescission relief to be available for TILA claims. The policy goals of the TILA, of protecting consumer rights while at the same time sustaining the viability of the mortgage lending industry, are advanced by this interpretation of the TILA.

The Petition should be denied.

REASONS FOR DENYING THE PETITION

I. A Circuit Split Does Not Exist On The Issue Of Whether Rescission Is Available On A Class-Wide Basis In TILA Claims

To date, two federal circuit courts of appeals have addressed the issue of whether class-wide rescission is available for TILA claims, and both of those circuit courts ruled consistently. *See McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 422-28 (1st Cir. 2007) (*McKenna*); *James v. Home Constr. Co.*, 621 F.2d 727, 730 (5th Cir. 1980). Like in the California court of appeal's decision here, those circuit court opinions found rescission under TILA is a personal remedy and not susceptible to class-wide application. (*Id.*) Four district court decisions have also found class-wide rescission is not available for TILA claims. *See Gibbons*, 208 F.R.D. at 285-86; *Murry v. America's Mortg. Banc, Inc.*, 2005 U.S. Dist. LEXIS 11751, 2005 WL 1323364 *10-11 (N.D.Ill. May 5, 2005, No. 03 C 5811); *Jefferson v. Security Pac. Fin. Servs.*, 161 F.R.D. 63, 68-69 (N.D.Ill. 1995); and *Mayo v. Sears, Roebuck & Co.*, 148 F.R.D. 576, 583 (S.D.Ohio 1993).

In contrast, Petitioners cite to six district court decisions "allowing TILA rescission claims to be pursued, in some

fashion, as a class action." Petition at 10-11, *citing to In re Ameriquest Mortg. Co. Mortg. Lending Practices Litigation*, 2007 WL 1202544, *3 (N.D.Ill. 2007); *Andrews v. Chevy Chase Bank, FSB*, 240 F.R.D. 612 (E.D.Wis. 2007), appeal docketed, No. 07-1326 (7th Cir. Feb. 14, 2007); *Rodrigues v. Members Mortg. Co.*, 226 F.R.D. 147, 153 (D.Mass. 2005); *Latham v. Residential Loan Ctrs. of Am., Inc.*, 2004 U.S. Dist. LEXIS 7993, 2004 WL 1093315 (N.D.Ill., May 6, 2004, No. 03 C 7094); *McIntosh v. Irwin Union Bank & Trust Co.*, 215 F.R.D. 26, 33 (D. Mass. 2003); and *Williams v. Empire Funding Corp.*, 183 F.R.D. 428, 435-36 (E.D.Pa. 1998).

These six district court decisions do not create a "split" in the law, requiring Supreme Court review. Two of these six are Massachusetts district court decisions that preceded the First Circuit's recent decision finding class-wide relief is not available for TILA rescission claims. *See McKenna,* 475 F.3d at 418 (reversing a Massachusetts district court decision). The Massachusetts district court cases have no life after *McKenna*. Two more of the six were decided by a single district court in Northern Illinois. Finally, *Andrews* is slated for decision by the Seventh Circuit later this year. See Petition at 10, fn. 2. At best, three different district courts throughout the country disagree with the decisions of two circuit courts of appeals, four district courts, and the California appellate court's decision here – certainly not a "conflict" of sufficient magnitude to warrant Supreme Court intervention.[1]

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[1] If a conflict in the circuits is created when the Seventh Circuit decides the *Andrews* appeal, the parties in that case will have the opportunity to petition this Court for review. Until a conflict between the circuits exists, however, review is not warranted.

II. The Circuit Courts Of Appeals And The California Court Of Appeal Have Correctly Construed TILA To Preclude Rescission On A Class-Wide Basis

The Fifth Circuit was the first circuit court to hold that rescission class actions are not maintainable under the TILA. *See James*, 621 F.2d at 730-31. The court's opinion in *James* focused almost exclusively on the individual nature of the rescission remedy under TILA. A number of district court decisions followed the Fifth Circuit's lead in *James*, including a federal district court decision from Northern California. *See Gibbons*, 208 F.R.D. at 280-86. The court of appeal's decision here relied on this federal precedent, but also disagreed with a Massachusetts district court case that was argued by Laliberte and the O'Connors, where the district court allowed a class action rescission claim under TILA. *See Laliberte*, 147 Cal. App. 4th at 8-11, disagreeing with *McKenna v. First Horizon Home Loan Corp.*, 2005 U.S. Dist. LEXIS 41491 (D.Mass., Nov. 10, 2005, Civ.A. No. 04-10370-RCL). Four days after the court of appeal issued its decision in this case, the First Circuit Court of Appeals reversed the district court decision in *McKenna*. Expanding on the analysis from *James*, the First Circuit rested its holding primarily on its conclusion "that Congress did not intend rescission suits to receive class-action treatment." *McKenna*, 475 F.3d at 423-27.

A. Congressional Intent, As Indicated From The Face Of The TILA

The main indication of congressional intent is found on the face of the TILA. The TILA provides for two remedies for violations of its provisions: damages (15 U.S.C. § 1640(a)(2)(B)) and rescission (*id.* § 1635). Section 1640,

dealing with damages, specifically addresses class actions. *Id.* § 1640(a)(2)(b). Indeed, § 1640 is entitled "Civil liability" and the relevant subsection thereto is entitled "Individual or class action for damages; amount of award; factors determining amount of award." *Id.* § 1640(a). Substantively, § 1640 provides separate limits on the damages available in individual actions ($2,000) and in class actions (the lesser of $500,000 or 1 per centum of the creditor's net worth). *Id.* § 1640(a)(2)(A), (B).

Section 1635, dealing with rescission, makes no comparable mention of the class action mechanism. *See id.* § 1635. Section 1635's failure to make any mention of class actions could mean one of two things: either Congress intended rescission to be unavailable as a class remedy for TILA claims or it intended rescission to be available without restraint in a class action. It is illogical that Congress would limit the recovery of damages available on a class basis, while at the same time allowing unlimited rescission claims. A creditor's exposure in rescission cases easily could be significantly greater than the cap on damages in class action cases. This distinction between the two remedy sections of the TILA strongly supports a conclusion that Congress did not intend for the rescission remedy to apply on a class-wide basis. See *United States v. Green*, 407 F.3d 434, 443 (1st Cir. 2005) (ordinarily, inclusion of specific provision in one part of statute and exclusion of similar provision in another part should be treated as deliberate).

B. Congressional Intent As Apparent From Legislative History

Congressional intent is also apparent from the legislative history of the TILA. The damages section of the TILA

(15 U.S.C. § 1640) was amended twice in 1995, as a response to the Eleventh Circuit's decision in *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994). In *Rodash*, a case filed by an individual debtor, the Eleventh Circuit held that a creditor's violation of TILA by selecting an incorrect form for disclosure of rescission rights justified rescission of a mortgage loan. *Id.* at 1147. Responding to *Rodash*, Congress first enacted a moratorium on class actions brought based on relatively minor technical infractions under TILA. *See* Truth in Lending Class Action Relief Act of 1995, Pub.L. No. 104-12, § 2, 109 Stat. 161, 161-162 (amending 15 U.S.C. § 1640 by adding subsection (i)). During the moratorium, Congress amended the TILA to provide for increased tolerance of honest mistakes in certain disclosure requirements. *See* Truth in Lending Act Amendments of 1995, Pub.L. No. 104-29, § 3, 109 Stat. 271, 272-73.[2]

Thus, in reacting to an abuse in the application of the TILA that was becoming readily apparent, Congress enacted legislation directed at the core of the issue by narrowing the scope of various disclosure requirements to avoid liability for technical infractions. By not correcting the problem by expressly exempting class action rescission claims, Congress did not impliedly create a class right of action for rescission claims. As stated by the court in *McKenna*, "[w]e would not

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[2] In the Congressional Record, the chairman of the Banking Committee explained the legislation was motivated by a concern that the banking industry would be overrun with liability due to wholesale rescissions of mortgage loans based on relatively minor violations of the TILA. *See* 141 Cong. Rec. S14566, 14567 (Statement of Sen D'Amato, expressing an awareness that the "threat of wholesale rescissions presents a real danger to our modern system of home financing: potential liability that could reach into the billions.").

expect Congress expressly to exempt from class-action rules a process for which it never fully delineated an individual right of action." *McKenna*, 475 F.3d at 425-26. On the contrary, the TILA's rescission provision presumptively anticipates individual exercise of the rescission remedy, "with the creditor and debtor working out the logistics of a given rescission." *Id.* at 421; *see also* 15 U.S.C. § 1635.[3]

Earlier, the legislative history of the TILA shows Congress amended 15 U.S.C. § 1640 in 1974 to set the cap on the damages recoverable in a class action under the TILA. Initially, Congress set the cap at the lesser of $100,000 or 1 per centum of the net worth of the creditor (Pub.L. 93-495, Title IV, § 407, 88 Stat. 1500, Oct. 28, 1974), but it raised the cap two years later to the lesser of $500,000 or 1 per centum of the creditor's net worth (Pub.L. 94-240, 90 Stat. 257, March 23, 1976). *See* 15 U.S.C. § 1640(a)(2)(B). The purpose of the cap on damages was "to protect small business firms from catastrophic judgments." H.R. Conf. Rep. No. 93-1429 (1974), quoted in *Johnson v. West Suburban Bank*, 225 F.3d 366, 372 (3d Cir. 2000). Significantly, at neither time (nor at any time thereafter) did Congress make a comparable amendment to the rescission provision in the TILA.

Petitioners make an overstated argument that an inference of congressional intent from congressional inaction misapplies the rules of statutory construction. Petition at 12-18. It is true that the ability to infer congressional intent from congressional inaction is an area open to dispute.

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[3] *See also Belini v. Wash. Mut. Bank*, 412 F.3d 17, 25 (1st Cir. 2005) (the TILA's rescission provision "is written with the goal of making the rescission process a private one, worked out between creditor and debtor without the intervention of the courts.").

Compare Cleveland v. United States, 329 U.S. 14, 17-18, 67 S.Ct. 13, 22-23, 91 L.Ed. 12 (1946) (Rutledge, J., concurring, finding congressional inaction unpersuasive) *with Johnson v. Transportation Agency*, 480 U.S. 616, 629 fn. 7, 671, 107 S.Ct. 1442, 1450, 1472-73, 94 L.Ed. 2d 615 (1987) (majority opinion applying rule of inaction to infer congressional intent; Scalia, J., dissent, opining "vindication by congressional inaction is a canard"). However, this is not the case for the Supreme Court to sort out the viability of that rule.

Suffice it to say that if the rule is applied, it favors a finding Congress never intended for rescission claims to proceed as class action lawsuits. As the court of appeal in this case logically noted: "We . . . find it difficult to believe that Congress would carefully balance the deterrent effect of class actions under TILA against the potential harm to businesses in the context of statutory damages, and yet allow class action rescission to proceed without any safeguard for the affected business." *Laliberte*, 147 Cal. App. 4th at 11. Answering further the question of why Congress might cap recovery on class actions under 15 U.S.C. § 1640 and not do so under § 1630, the court found the answer "in the status of case law in 1974 and 1976, when the cap was enacted and increased. During this time period, numerous cases recognized that class actions seeking damages under § 1640 were appropriate, but class actions seeking rescission were virtually nonexistent." *Laliberte*, 147 Cal. App. 4th at 11.[4]

Finally, this analysis of Congressional intent, apparent from both the face of the statute as well as its legislative

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[4] The court of appeal cited to *Nelson v. United Credit Plan, Inc.*, 77 F.R.D. 54, 58, (E.D.La. 1978) wherein the court noted that at that time "there is not a single precedent in which class certification was broached, much less granted or denied, in a case where rescission pursuant to 15 U.S.C. § 1635 was the relief prayed for."

history, is consistent with the practicalities of the litigation process. In the words of the court in *McKenna*, the "highly individualized character of [the rescission] process and the range of variations that may occur render rescission largely incompatible with a sensible deployment of the class-action mechanism." *McKenna*, 475 F.3d at 424-25.

III. Class-Wide Rescission Under TILA Would Abrogate The Policies Underlying TILA

No doubt, Congress recognizes the delicate balance that must be maintained between applying the TILA sufficiently to provide vital consumer protection, and applying the TILA too stringently, resulting in financial disaster for the mortgage industry. *See* 141 Cong. Rec. S14566-14568. In protecting this balance, courts have concluded Congress intended rescission under the TILA to be a "purely personal remedy" – a status inconsistent with class action recovery. *See, e.g., James, supra,* 621 F.2d at 731. The rescission steps laid out in the statute are steps that are personal, to be taken by an individual obligor and the creditor, and not steps that can be taken by a group of obligors, in the aggregate.[5] *See* 15 U.S.C. § 1635; *see also James*, 621 F.2d at 731. Further, unlike damages claims, the TILA does not subject rescission claims to an aggregate statutory cap, so that rescission class actions, if allowed, could easily render a creditor insolvent. *See McKenna*, 475 F.3d at 423; *Gibbons*, 208 F.R.D. at 285-86. On the other hand, the availability of substantial monetary recoveries and attorneys' fees in individual rescission cases

[5] As the court of appeal stated in this case, "[u]nlike class actions seeking damages or an injunction, rescission under TILA creates obligations between both the lender and the borrower." *Laliberte*, 147 Cal. App. 4th at 10.

makes the availability of the class-action vehicle in the TILA context unnecessary. *See, e.g., Jefferson,* 161 F.R.D. at 68-70.

Petitioners argue that the courts' and Congress's fears about the catastrophic effect class action rescission claims could have on the home mortgage industry are overstated. Petition at 18-19. In particular, Petitioners claim that upon rescission, lenders will not lose their security interest prior to the restoration of their principal because a court may require that the borrower restore the principal to the lender as a prerequisite to rescission. *Id.* (relying on *Palmer v. Wilson,* 502 F.2d 860, 862 (9th Cir. 1974) and *Yamamoto v. Bank of New York,* 329 F.3d 1167, 1171 (9th Cir. 2003).) The law on the equitable remedies available to a court in granting rescission under TILA, as developing in the Ninth Circuit, is not so broad as Petitioners assert, and is consistent with limiting TILA claims for rescission to individual actions. The court in *Palmer* noted that "[t]he propriety of such a conditional decree of rescission, of course, will depend on the equities present in a particular case . . ." *Palmer*, 502 F.2d at 862; *see also Yamamoto*, 329 F.3d at 1173 (emphasizing that the inquiry as to the appropriate equitable relief is a factual inquiry that must be resolved on a "case-by-case" basis). The case-by-case, factual nature of whether a conditional decree of rescission is appropriate, is not consistent with the basic premise of a class action, that it is available only where common issues of fact predominate.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant their Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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